IN THE

Supreme Court of the United States

OCTOBER TERM 1969

~~319~~ 1

No. .....

RICHARD W. CROUGHAN,

Petitioner,

against

MICHAEL J. MURPHY, Police Commissioner of the City of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court, Appellate Division, Second Judicial Department, entered on the 27th day of January, 1969. A motion for leave to appeal to the Court of Appeals of the State of New York was denied and was entered in this case on April 10, 1969.

Citations to Opinions Below

The order of respondent, dated May 18, 1964, dismissing petitioner from the Police Department of the City of New York, is printed in Appendex A hereto, *infra*, page 14.

The order of the Appellate Division, Second Judicial Department, of the Supreme Court of the State of New York, dated January 27, 1969, affirming the respondent and rendered without written opinion, is printed in Appendix B hereto, *infra* page 16. A motion for leave to appeal to the Court of Appeals of the State of New York was denied on April 10, 1969, and the said order is printed in Appendix C, hereto, *infra* page 18.

Jurisdiction

The order denying leave to appeal to the Court of Appeals of the State of New York was entered on April 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

Questions Presented

1. Is the dismissal of a police officer of the City of New York, after a departmental hearing, on the basis of a finding of guilty of an offense that was not pleaded against him nor charged against him and not added by way of amendment at the hearing a violation of his constitutional right of procedural due process?

2. Was the department trial of petitioner on a charge cognizable under the Penal Code of New York, which matter was turned over to the District Attorney for presentment and indictment and upon which an indictment was never returned, a deprivation of petitioner's constitutional rights to indictment by a grand jury and trial by a petit jury?

3. Whether the dismissal of a police officer of the City of New York on the basis of a finding of guilty of the violation of a rule and regulation of the department not

promulgated until nearly a year after the date of its alleged offense, constitutes a violation of the due process clause of the 5th and 14th Amendments.

Statement

On December 6, 1963, the petitioner, Capt. Richard W. Croughan, of the New York City Police Department, was served with twelve charges and specifications of alleged misconduct as a police officer. One month later he was served with five additional specifications. At the police department trial, which dismissed him from the force after a brilliant 16-year career with the attendant loss of pension and retirement benefits, all the seventeen charges and specifications were consolidated.

The alleged misconduct is, on the whole, repetitive, and a multiplication of the offenses, essentially accusing the petitioner of violating the rules and procedures of the Police Department, and generally charging the following classes of misconduct: "Moonlighting", that is, engaging while off duty as a part time law clerk and subsequently as a lawyer; conduct "which would tend to bring adverse criticism" on the Department in that he practiced law while a police officer and conflict of interest by maintaining a lawyer-client relationship with other members of the Police Department. Rules and regulations of the Police Department were cited in each case as having been violated.

One extremely serious additional charge was also alleged —the solicitation of legal business. There was no specific rule or regulation proscribing such conduct so it was charged under the catch-all charge as further conduct which would tend to bring adverse criticism on the Department.

Since the charge of solicitation was the allegation of very serious crimes, violations of the New York Penal Law, Sections 270 *et seq.* (at that time), and of the Judiciary Law, Section 90, against a man who, as a lawyer was

an officer of the Court and as a Police officer was rated the number one Captain of the Police Force in his division (1B)*, he demanded that the matter be turned over to the District Attorney for presentment to the Grand Jury (1B, 1C).

The entire matter was turned over to the District Attorney of Queens County and the Police Trial Commissioner adjourned the departmental trial from time to time (1L, 1M, 1P, 1R, 1S) stating "until a disposition of the matter by the District Attorney of Queens County, we'll hold that matter in abeyance" (1L).

The petitioner wrote a letter to the Grand Jury volunteering to testify (1P) but he was never called and no indictment was ever returned by the Grand Jury of Queens County. The departmental trial finally commenced almost four months later (19).

As a result of the departmental trial petitioner was found guilty of eleven of the specifications but was found not guilty of all the specifications of solicitation charged (See Appendix A). Except in one instance the findings of guilt of the Trial Commissioner constitute nothing more than "moonlighting" in the outside off-duty practice of law, although restated in several fashions.

The one finding constituting the exception is of critical importance. That was a finding of guilt of the solicitation of legal business. This was not one of the solicitations originally charged. This solicitation was never pleaded, never charged, never incorporated in the bill of particulars served on petitioner and never added by way of amendment at the trial.

Of the original specifications, two (No. 4 and No. 6) charged the petitioner with the crime of solicitation. Pe-

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* Unless otherwise noted the numbers in parentheses are references to the pages of the transcript of the hearing before the Police Trial Commissioner.

titioner demanded that respondent amplify his charges by citing the instances wherein petitioner solicited such legal business. Respondent served a bill of particulars in which he charged 12 instances of alleged solicitation. The entire matter was turned over to the District Attorney of Queens County. No indictment was ever returned and petitioner was specifically found not guilty of solicitation in these 12 instances at the departmental trial.

Specification 8 charged petitioner with conflict of interest in violation of the rules and regulations of the Police Department but not with the crime of solicitation. In No. 8 petitioner was charged with having investigated, in his departmental capacity, an accident in which a Patrolman Timothy Sullivan was involved. The conflict of interest charged is that at the same time that he made administrative departmental recommendations and determinations, the law firm he was associated with was also retained by Sullivan to pursue the civil liability aspects of the accident. This is not a charge of having solicited the case.

While Sullivan was testifying at the hearing, some four months after the Police Department had completed the investigation of the basic facts giving rise to the charges and had formulated the charges without charging the Sullivan case as a solicitation, the trial prosecutor for the first time decided that he wanted to amend the bill of particulars to allege the Sullivan matter as a solicitation (588). At that point in the hearing the following colloquy occurred between the trial prosecutor and the trial commissioner (588):

> "Dep. Com. Melia: I am denying the motion to amend the Bill of Particulars. I am granting the motion to amend the specifications. [This specification amendment was as to dates only, not substantive matter.].
>
> Mr. Geisler: The Bill of Particulars is—necessarily limits our proof.

Dep. Com. Melia: Right.

Mr. Geisler: So if we don't have the bill of particulars amended then we would be unable to submit this as proof of the charges."

Thus the addition of the Sullivan matter as a solicitation charge was rejected at the departmental hearing. Defense counsel for the petitioner necessarily conducted himself thereafter as if this charge was not in the case, for indeed it wasn't. It was not originally charged and its addition by way of amendment was rejected.

Nevertheless this is the single finding of guilty of anything of a criminal or serious nature which served as the basis for petitioner's dismissal as a result of the departmental trial. The other guilty findings were nothing more than some aspect of "moonlighting."

Petitioner was also found guilty under Specification 8, of Conflict of Interest in violation of paragraph 35.00 of Chapter 2 of the Rules and Procedures of the Department. The time delineation of this charge is clearly alleged as "from about August, 1961 to November 1961 while a Captain of this Department and assigned to the 17th Division."

But paragraph 35.00 of Chapter 2 of the Rules and Procedures was not in effect at the time of its alleged violation. This Rule was not promulgated as binding on members of the police force until the issuance of General Order No. 22 of the Department on June 8, 1962.

Thus this finding of guilt of conflict of interest upon which petitioner's dismssal is also based was the violation of a Rule not promulgated until at least seven months after its alleged violation.

The recommendation of the Trial Commissioner was dismissal from the Department. This dismissal was ordered by the Police Commissioner. The Supreme Court,

Appellate Division, Second Judicial Department confirmed the dismissal in an order rendered without written opinion. A motion for leave to appeal to the Court of Appeals of New York State was denied on April 10, 1969. The matters and issues raised herein were raised in the Courts and proceedings in New York State. Petitioner has now exhausted any available remedy in New York State Courts.

Reasons for Granting the Writ

1. The decision below is believed to be erroneous and appears to conflict with the decision of this Court in *Re Ruffalo*, 390 U. S. 544, 20 L. Ed. 2d 117, reh. den. 391 U. S. 961, 20 L. Ed. 2d 874 (1968).

In the cited case of *Re Ruffalo, supra,* the petitioner, a trial lawyer, was brought before the Ohio Board of Bar Commissioners on Grievances and Discipline. He was charged with the misconduct of soliciting legal business through an agent named Orlando. After Orlando had testified on the solicitation charge, the charge of misconduct was changed from solicitation to a charge of misconduct for the hiring of Orlando, a railroad car inspector, to investigate FELA claims against Orlando's employer. This charge was not in the original charges but was added only after Orlando testified. Although petitioner was granted a continuance in order to have time to respond to the new charge, his motion to strike the charge was denied.

Ruffalo was suspended from practice in Ohio on the basis of this added charge and other misconduct (*Mahoning County Bar Assn.* v. *Ruffalo,* 176 Ohio St., 263, 199 N. E. 2d 396). That order became final and was not reviewed by this Court.

However, the proceedings to disbar Ruffalo from practice in the Federal Courts on the original record of the State proceedings reached this Court and this Court reversed

because of the added charge on the specific ground that: (390 U. S. at 552, 20 L. Ed. 2d at 123.)

> "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

In the instant case, petitioner, a lawyer and policeman, was brought before the Trial Commissioner of the Police Department of the City of New York. He was charged with the misconduct of conflict of interest because while making departmental recommendations as a police superior concerning a personal injury received by a police officer named Sullivan, the law firm he was associated with was also retained to pursue the civil liability aspects of the accident. After Sullivan testified on the conflict of interest charge, an attempt was made by the trial prosecutor to change the charge of misconduct from specification conflict of interest to a charge of the solicitation of legal business. This specification was not in the original charges but the attempt to change the original charges to include this as a solicitation was made only after Sullivan had testified.

Although the motion to amend the bill of particulars to add the Sullivan Matter as a specification of solicitation was denied by the Trial Commissioner, petitioner was nevertheless found guilty of this solicitation in the Sullivan Matter.

In the instant case, it was argued below that the *Ruffalo* decision was not binding since petitioner here had a copy of a pre-trial statement of Patrolman Sullivan which should have indicated to petitioner that such a statement could have given rise to a charge of solicitation. Apparently such a theory was accepted by the New York Courts. A study of the record on appeal of the *Ruffalo* case in this Court, and particularly the Petition for Rehearing, negates such an argument. In *Ruffalo* the charge was added on the third day of hearings which did not close until some eight

months later. Ruffalo was assured of whatever time he might wish for an answer (Pet. for Reh. p. 2). Ruffalo had absolute advance notice of the charges against him as they were the exact same as in the disbarment proceedings before the Supreme Court of Ohio in *Mahoning County Bar Association* v. *Ruffalo,* 1964, 176 Ohio St. 263, 199 N. E. 2d 396, cert. den. 379 U. S. 931 (1964).

How more flagrant a violation of petitioner's constitutional rights is this case when compared with *Ruffalo!* Here the charge was only attempted to be added during the middle of a week-long hearing some 4 months after the Police Department had the facts upon which they formulated all the charges. Here the motion to add the charge was denied, so petitioner was not advised that he had to defend against it; but nevertheless he was found guilty of it. Thus, petitioner was not only given no advance warning of the charge; when it finally arose he was assured he would not have to defend against it once its addition by amendment was denied.

It is submitted that since there was such a lack of fair notice as to the reach of the departmental trial and the precise nature of the charges, petitioner was deprived of procedural due process.

2. Since the questions of solicitations were turned over to the District Attorney of Queens County for presentment to the grand jury and no indictment ever issued, was not the Police Departmental trial thereafter restricted from adjudicating the solicitation issue?

Solicitation was both a crime cognizable under the Penal Code of New York State and a misconduct offense for a lawyer under the Judiciary Law of the State of New York.

Here the matter was turned over to the District Attorney and no prosecution was commenced. It was public knowledge, in fact the Judicial Inquiry into Attorneys had copies of the transcripts, and disciplinary proceedings were not commenced.

It is submitted that the proper forum to have adjudicated the issues of solicitation of legal business was either the Criminal Courts of New York or the Grievance machinery of the Bar of New York State. Both these agencies had the opportunity to act but did not. It seems to be fundamental, under the circumstances, that the solicitation questions were then beyond the reach of the Police Department Trial Commissioner.

In *O'Callahan* v. *Parker,* No. 646—October Term, 1968, decided June 2, 1969, this Court granted certiorari, to determine whether the exercise of jurisdiction by a military court-martial, concerning a charge cognizable in the civilian courts, deprived the petitioner "of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?" (393 U. S. at 822)

On appeal this Court answered that question in the affirmative. It is submitted that the principle of *O'Callahan* v. *Parker, supra,* should be extended to the departmental trials of the Police Department of New York City. This is particularly so when it is considered that the solcitation matters were turned over to the District Attorney of Queens County for grand jury action, and no indictment was ever returned.

Was not the action of the Police Department thereafter, to try him for solicitation under some catch-all charge of conduct prejudicial to the department, a deprivation of petitioner's constitutional rights to indictment by a grand jury and trial by a petit jury?

Settlement of this question by this Court is plainly in the public interest.

3. The finding that petitioner had violated a Rule and Regulation of the Police Department which was not promulgated until nearly a year after the alleged commission of the offense violates the due process clause of the 5th and 14th Amendments.

A rule of the Police Department proscribing certain conduct must give "fair warning" of the conduct that it prohibits or proscribes. (*U. S.* v. *Harriss*, 347 U. S. 612 (1954).) A police officer cannot be held responsible for the violation of a rule of the Department which was not in effect at the time he is claimed to have violated it.

On June 8, 1962, the Rules and Procedures of the New York City Police Department were for the first time amended to add R. & P. 2/35.00.

Petitioner is found guilty of violating R. & P. 2/35.00 some seven months earlier.

Respondent has not disputed this assigned error in the New York State Courts. By not meeting and disputing this issue respondent should be deemed to be conceding it. Nevertheless, it has either been ignored or overlooked by the New York Courts.

The prohibition against such practices by the Police Department of the City of New York that would come about by a reversal in this case is clearly in the public interest since these practices are likely to continue if not checked in this case.

4. The dismissal of petitioner from the Police Force was an unconstitutional selective enforcement of an administrative regulation.

The isolated finding of solicitation must have weighed most heavily in the fixation of petitioner's drastic punishment—dismissal—for without it, all that remains against petitioner is moonlighting. And never in the long history of the Police Department of New York City has any member of the force been dismissed for off duty moonlighting. Significant also is the fact that off duty moonlighting is now generally allowed as the public policy of New York (Section 208-d, General Municipal Law of New York; Ch. 812 of the Laws of 1967, New York).

Contemporaneous with the case of petitioner were four other similar cases involving a police officer-lawyer charged with practicing law in off duty hours, including the charge of handling matters for other policemen. (See, e.g., *Matter of Fendel,* 25 A. D. 2d 733 (First Dept. 1966).)

Each of these four other cases was punished by a 30 day suspension without pay. The petitioner herein was dismissed.

Matter of Fendel, supra, involved precisely the same charges as alleged against petitioner. Similarly, there was a single finding of guilty of solicitation, but this was reversed by the First Department, Appellate Division of the New York Supreme Court. Thereafter, on the exact same remaining charges, both qualitatively and quantitatively as are here, *Fendel* was punished with a 30 day suspension.

To avoid any speculation that the charges here might have interfered to a greater degree with petitioner's professional performance, than in the other cases cited, petitioner requested and received the stipulation from the trial prosecution that there was (744):

> "No evidence offered in this case of any specific acts or omissions of inefficiency on the part of Captain Croughan."

In *Cox* v. *Louisiana,* 379 U. S. 536, 557-8 (1965), this Court pointed out that:

> "It is clearly unconstitutional to enable a public official to . . . engage in invidious discrimination among persons or groups . . . by selective enforcement of an extremely broad prohibitory statute."

As no one has ever been dismissed from the New York City Police Department who was found guilty of or pleaded

guilty to charges of a similar nature as petitioner is found guilty of here, his dismissal is an abuse of discretion and the improper, illegal and unconstitutional selective enforcement of a statute, which should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DENIS M. HURLEY,
Counsel for Petitioner.

JOHN F. HAGGERTY,
of Counsel.

Dated: Brooklyn, N. Y., July 3, 1969.

APPENDIX A

POLICE DEPARTMENT
CITY OF NEW YORK

FINAL ORDER OF DISMISSAL

Cases #35873, #35984.

May 18, 1964.

In the Matter of Charges Against CAPTAIN RICHARD W. CROUGHAN, #83102, Patrol Borough Bklyn. North, of the Police Force, Police Department, City of New York.

Upon reading and filing certain written charges in this matter, wherein he is charged with VIOLATION OF RULES AND PROCEDURES, dated December 5th, 1963, and January 17th, 1964, duly made and preferred in the form and manner prescribed by law and the rules and procedures of the said Police Department by Inspector Sidney Cooper, P.C.C.I.U., against the said CAPTAIN RICHARD W. CROUGHAN, a member of the police force of said city, and it having been duly proved that a copy of such charges, together with a written notice that the same had been made and preferred against him, the said CAPTAIN RICHARD W. CROUGHAN, requiring him to appear and answer thereto at a proper time and place named in said notice, has been duly served upon him, the said CAPTAIN RICHARD W. CROUGHAN, in the manner required by law and the said rules and procedures; and he, the said CAPTAIN RICHARD W. CROUGHAN, having appeared and answered at the time and place mentioned and required by said notice, and the said charges having been duly brought to a hearing, and duly tried, heard, publicly examined and investigated, in the manner required by law and the rules and procedures of the said Police Department, before HON. ALOYSIUS J. MELIA, Deputy Police Commissioner, on the 16th day of December, 1963, and the 14th and 20th days of January, the 3rd day of February, and

the 4th, 5th, 6th, 10th, 11th, and 13th days of March, 1964, and a full opportunity having been afforded to the said CAPTAIN RICHARD W. CROUGHAN, to be heard in his defense, and the proofs and allegations in relation to said charges having been duly taken, and recorded as required by law, and the said rules and procedures, and the determination of said charges, based upon the entire record adduced at the hearing, and the findings and recommendations made thereon, having been referred to the Police Commissioner, the Police Commissioner, upon due consideration, and review of said findings and recommendations, and upon inquiry of and consultation with said Trial Commissioner, adjudges the said CAPTAIN RICHARD W. CROUGHAN, to be GUILTY, of the Charges, and GUILTY of specifications 1, 2, 3, 4, 5, and GUILTY, of specification 6, except NOT GUILTY of solicitation, GUILTY, of specifications 7, and 8, NOT GUILTY, of specifications 9, 10, 11, 12, and 13, GUILTY of specifications 14, and 15, and GUILTY of specification 16, except NOT GUILTY of receiving compensation, NOT GUILTY, of specification 17, and does convict him of specifications 1, 2, 3, 4, 5, and of 6, except not guilty of solicitation and does convict him of specifications 7, 8, 14, 15, and of 16, except NOT GUILTY of receiving compensation, and upon such conviction, adjudges and determines that he, the said CAPTAIN RICHARD W. CROUGHAN, be, and he hereby is, DISMISSED from the Police Force, Police Department, City of New York.

MICHAEL J. MURPHY,
Police Commissioner.

APPENDIX B

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on January 27, 1969.

HON. ARTHUR D. BRENNAN,
Acting Presiding Justice.
HON. SAMUEL RABIN,
HON. JAMES D. HOPKINS,
HON. A. DAVID BENJAMIN,
HON. M. HENRY MARTUSCELLO,
Associate Justices.

ORDER DISMISSING PROCEEDING

In the Matter of

RICHARD W. CROUGHAN,

Petitioner,

v.

MICHAEL J. MURPHY, Police Commissioner of the City of New York,

Respondent.

A proceeding having been instituted by the above named Richard W. Croughan, petitioner, by petition verified September 15, 1964, to annul determination of respondent dated May 18, 1964; by order of the Supreme Court, Queens County, dated July 23, 1965 the proceeding having been transferred to this court for determination; and the proceeding having been argued by John F. Haggerty, Esq., of counsel for petitioner and by Edmund D. Hennefeld,

Esq., of counsel for respondent; due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that respondent's determination, dated May 18, 1964 is hereby unanimously confirmed, without costs; and proceeding dismissed on the merits.

Enter:

HERMAN M. POGUL,
Clerk of the Appellate Division.

APPENDIX C

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of April A. D. 1969.

Present, HON. STANLEY H. FULD,
Chief Judge, presiding.

Mo. No. 374

In the Matter of

the Petition of RICHARD W. CROUGHAN,

Appellant,

For a Judgment &c.,

vs.

MICHAEL J. MURPHY, Police Commissioner of the City of New York,

Respondent.

A motion for leave to appeal to the Court of Appeals &c. in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

CARSON KIMBALL,
Deputy Clerk.

(SEAL)